

MEMORANDUM

SUBJECT: Industry Questions on the Oil Spill Prevention, Control, and Countermeasure Rule

FROM: Marianne Lamont Horinko,
Assistant Administrator

TO: Karen V. Brown, Director
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Small Business Ombudsman

Thank you for your memorandum of August 14, 2002, forwarding questions from the Petroleum Marketers Association of America (PMAA), the Society of Independent Gasoline Marketers Association (SIGMA), the Petroleum Marketers and Convenience Stores of Iowa (PMCI), and the Independent Lubricant Manufacturers Association (ILMA). We will refer to these groups collectively as the "Marketers," as you did. The Marketers seemed concerned about the impact on their members of "new" revisions to the Oil Spill Prevention, Control, and Countermeasure (SPCC) rule. We note at the outset that there are few new requirements in the revised SPCC rule. Most of the changes are editorial clarifications of requirements that have existed since 1974.

The revised SPCC rule, published in the Federal Register on July 17, 2002, provides substantial relief to industry, particularly small business, while maintaining environmental protection. The revisions to the rule clarify that the rule is mandatory, answer many questions posed by commenters, and provide performance-based flexibility to facilities to follow the dictates of good engineering practice.

Small business benefits from many rule revisions. Revisions to the rule relieve many small facilities of the burden of preparing and implementing SPCC Plans by raising

the regulatory threshold, establishing a minimum container size subject to regulation, exempting facilities subject to all of the technical requirements of 40 CFR part 280 and 281 (mainly small gasoline stations), and exempting wastewater facilities. The exemptions have the effect of reducing the number of regulated facilities by approximately 55,000. Most of them are small businesses.

The revisions also simplify the paperwork requirements by approximately 40% and cut costs for those facilities remaining subject to the rule. They codify that a facility owner or operator has the flexibility to implement good engineering practice by deviating from rule provisions as long as the deviation provides equivalent environmental protection.

The reduction in size of the regulated community due to final rule revisions will lead to a capital-cost savings of approximately \$29.47 million per year. During the first year, regulated facilities will experience an increase in total paperwork cost burden of \$21.93 million due primarily to the need to read the rule. However, during the second year, total paperwork cost burden will decrease by about \$60.21 million, and beginning in the third year following the rulemaking, the total paperwork cost burden to all regulated facilities will decrease by about \$45.03 million. The result is an aggregate cost savings of about \$7.56 million during the first year, \$89.69 million during the second year, and \$74.51 million during subsequent years.

We have carefully considered the Marketers' questions and provide written answers below. Citations refer to relevant SPCC sections.

1. Question. Section 112.8(c)(2). What must a bulk plan owner do to “constrain precipitation” in cases of containment areas filled with ice, snow and water in winter, and how often must the containment area be cleared?

Answer. Since 1974, bulk storage facilities have been required to have secondary containment sufficient for the contents of the largest container and freeboard for precipitation. Additionally, these facilities also still must meet the secondary containment requirements of the local fire codes and National Fire Protection Association (NFPA) Standard 30, which have similar design requirements. Under §112.8(c)(2), if the owner or operator cannot provide secondary containment, because it is impracticable from an engineering standpoint, he must provide a contingency plan and take other such actions as are required by §112.7(d). If rain, ice, or snow fill the secondary containment systems in winter, then such systems might not have the required capacity. The question then arises: does the presence of rain, ice, or snow constitute a reason to determine that secondary containment is impracticable from an engineering standpoint?

A determination of impracticability from an engineering standpoint involves examination of whether space or other geographic limitations of the facility would accommodate secondary containment or if local zoning ordinances or fire prevention

standards or safety considerations would not allow secondary containment; or, if installing secondary containment would defeat the overall goal of the regulation to prevent discharges as described in §112.1(b). Therefore, the mere presence of rain, ice, or snow within the secondary containment system may not be considered in the original determination of whether secondary containment is impracticable from an engineering standpoint. Thus, containment must be properly sized for all precipitation events (i.e., rain and snow). However, the owner or operator may explain in the SPCC Plan that during certain times of the year a contingency plan may be used to supplement the lack of capacity experienced during these weather conditions, when sufficient secondary containment becomes impracticable.

2. Question. The final rule allows for certain SPCC guidelines not to be adopted and to be simply noted and explained in the facility's Plan; however, the rule also allows an EPA inspector to disagree and require the SPCC Plan to be amended. Will penalties be imposed on owners in cases where a PE certification of the lack of need to include a SPCC guideline is refuted by EPA? How long does the owner/operator have to make changes based on such reversal?

Answer. The final rule does not permit a facility owner or operator to disregard any SPCC guidelines and to simply note and explain such disregard in the facility's SPCC Plan (Plan). The revised rule does, however, allow for deviations (see §112.7(a)(2)) for most rule requirements except those dealing with secondary containment; and allows the use of contingency planning combined with integrity testing in lieu of the secondary containment requirements when secondary containment is impracticable from the standpoint of good engineering practice (see §112.7(d)). A requirement that is not applicable to a facility must be noted in the SPCC plan with an explanation as to why it is not applicable.

An owner or operator does not need to submit a deviation determination to the EPA Regional Administrator (RA). If, however, the RA becomes aware of such a deviation because of a facility inspection, for example, he may require an owner or operator to amend his Plan if he finds that it does not meet the requirements of 40 CFR part 112 or that an amendment is necessary to prevent and contain discharges from the facility. The RA must notify the owner or operator of EPA's intent to require Plan amendment and specify the terms of such proposed amendment. Within 30 days of receipt of such notice, the owner or operator may submit written information, views, and arguments on the proposed amendment. After considering all relevant material presented, the RA must notify the owner or operator of any amendment required or rescind the notice. The owner or operator then has 30 days to amend, unless the RA, for good cause, specifies another effective date. The owner or operator must implement the amended Plan as soon as possible, but not later than six months after amendment, unless the RA specifies another date.

The owner or operator may appeal, within 30 days of receipt of the RA's decision,

any decision of the RA requiring Plan amendment to the EPA Administrator. The EPA Administrator has 30 days from receipt of the notice of appeal to make a decision on that appeal. EPA will not impose penalties for failure to amend a Plan until the owner or operator has failed to comply with a final decision requiring Plan amendment, but any failed appeal will not extend a compliance deadline.

3. Question. Section 112.7(g)(1). Must each facility be fully fenced? The new rule says each facility “must” be fenced; the original rule says “should” be fenced. Based on the original “should” language, most plants conform to the Uniform Fire Code which requires fencing unless isolation (rural), natural barriers or other factors adequately address public safety. Is fencing now required?

The Uniform Fire Code requires loading/unloading entirely within the fence. Complying with these requirements would require very large enclosures with multiple gates if all facilities must now be fenced. Many properties are not large enough to comply with the Uniform Fire Code under these SPCC requirements. What compliance alternative(s) could rural plants use to meet SPCC fencing requirements?

Answer. Yes, a facility (except a production facility) is required to provide fencing and such is the case both under the current and former rule. In accordance with §112.7(g), facility handling, processing, and storage must be fully fenced. Fencing helps to deter vandals and thus prevent the discharges that they might cause. If any form of fencing is impractical, the owner or operator may explain his reasons for nonconformance with the rule and provide equivalent environmental protection by some other means in accordance with §112.7(a)(2).

EPA has always considered that §112.3 of the SPCC rule requires that SPCC Plans be prepared in accordance with §112.7, which in turn requires that Plans be prepared in accordance with good engineering practice. However, clarification of the rule was necessary because of confusion on the part of some facility owners or operators who have interpreted the former rule’s use of the words “should” and “guidelines” in §112.7 as an indication that compliance with the applicable provisions of the rule is optional. The rule used the words “should” and “guidelines” to provide flexibility for facilities with unique circumstances. Those circumstances might be such that mandated regulatory provisions would not be in accord with good engineering practice. Therefore, the rule gave facilities the opportunity to provide alternative methods that achieve equivalent environmental protection, or to show that the provisions were inapplicable based on specific circumstances.

In 1991, EPA proposed to clarify the regulations by generally substituting “shall” in place of “should” throughout the reorganized rule. In the final rule, EPA editorially changed “shall” to “must” in furtherance of the Agency’s “plain language” objectives. The “shall” to

“must” is not a substantive change but merely an editorial change. It will not add to the information collection burden. We have always included requirements prefaced by “should” in the information collection burden for the rule. The Agency will continue to provide flexibility for an owner or operator who can explain his reasons for nonconformance with rule requirements and can provide alternate measures from those specified in the rule which achieve equivalent environmental protection. Section 112.7(a)(2) will provide such flexibility.

The EPA RA may require an owner or operator to amend his Plan if he finds that it does not meet the requirements of 40 CFR part 112 or that an amendment is necessary to prevent and contain discharges from the facility. The RA must notify the owner or operator of EPA’s intent to require Plan amendment and specify the terms of such proposed amendment. Within 30 days of receipt of such notice, the owner or operator may submit written information, views, and arguments on the proposed amendment. After considering all relevant material presented, the RA must notify the owner or operator of any amendment required or rescind the notice. The owner or operator then has 30 days to amend, unless the RA, for good cause, specifies another effective date. The owner or operator must implement the amended Plan as soon as possible, but not later than six months after amendment, unless the RA specifies another date.

The owner or operator may appeal, within 30 days of receipt of the RA’s decision, any decision of the RA requiring Plan amendment to the EPA Administrator. The EPA Administrator has 30 days from receipt of the notice of appeal to make a decision on that appeal. EPA will not impose penalties unless the owner or operator has failed to comply with a final decision requiring Plan amendment, but any failed appeal will not extend a compliance deadline.

Owners and operators should, of course, take all necessary steps to come into compliance with this part as soon as possible. In exercising its prosecutorial discretion, the Agency always takes into account the good faith and efforts to comply of an owner or operator who has been in noncompliance with applicable laws and regulations when deciding whether or not to take an enforcement action.

4. Question. Section 112.8(c)(8). The rule requires each installation to have an alarm device or to use gauges, with a person present to monitor. The use of gauges is in conflict with DOT regulations which do not allow a driver to be more than 25 feet away from the truck [49 CFR 177.834(i)]. How can Marketers cost-effectively comply with this requirement.

Answer. The intent of §112.8(c)(8) is to provide bulk storage containers with equipment to prevent overfills. The overfill prevention device must be engineered to alert the person conducting the transfer of a pending overfill condition. However, an operator/driver could check a container’s visual gauge prior to the commencement of the unloading process to

confirm that the container's ullage is greater than the amount of oil that is to be transferred from the truck or railcar to the receiving container. Facility personnel who are able to communicate with the oil supplier (tank truck or railcar) could then gauge the container at frequent intervals. Thus, there is no conflict with 49 CFR 177.834(i)(3) in that the "25 foot rule" is a requirement that must be met during the unloading process, not prior to it. If the driver/operator is unable to view the gauge and/or container during the transfer process, additional personnel or equipment may be required. Additionally, under §112.8(c)(8), the owner or operator has a broad choice of the devices to use to avoid overfills/discharges. If none of the devices listed are practicable, the owner or operator may substitute another measure which provides equivalent environmental protection per §112.7(a)(2).

5. Question. Section 112.8(c)(6) requires integrity testing. Tests listed are very costly for small businesses. What other form of testing could be used and what is the approval process for an alternative test method? What is a "regular schedule" for testing? Does "visual inspection" mean internal or external inspection of the container? Further, §112.2 notes that only containers with a capacity of 55 gallons or more are counted. Does that mean that 55-gallon drums now must be tested? In many cases, 55-gallon drums handled by Marketers are owned by a lubricating oil manufacturer or a drum supplier. If testing is required, who is responsible for the testing of the drum?

Answer. The owner or operator may use any method of integrity testing that satisfies good engineering practice in lieu of one of the specific methods listed in the rule. The Professional Engineer (PE) certifying the SPCC plan may approve any integrity testing method that accords with good engineering practice.

Testing on a regular schedule means testing in accordance with the industry standards selected by the certifying engineer or at a frequency selected by the certifying engineer that will prevent discharges. Whatever schedule the PE selects must be documented in the Plan. In anticipation of this new requirement and the impact on smaller operators, EPA worked with the Steel Tank Institute (STI) to develop STI SP001-00, "Standard for Inspection of In-service Shop Fabricated Aboveground Tanks for Storage of Combustible and Flammable Liquids." This standard is targeted to smaller operators who utilize shop fabricated aboveground storage tanks. For more information on this standard see the STI website at www.steeltank.com and www.steeltank.com/library/pubs/sp001-01.htm.

The extent of visual inspection is normally prescribed by a specific industry standard which the PE selects to meet the integrity testing requirement. The rule requires visual testing in conjunction with another method of testing, because visual testing alone is normally insufficient to measure the integrity of a container. Visual testing alone might not detect problems which could lead to container failure.

Fifty-five gallon drums serving as bulk storage containers are subject to the integrity

testing requirement and always have been. The owner or operator of the facility has the responsibility to test such drums for integrity. For certain smaller shop-built containers (e.g., a 55 gallon drum) in which internal corrosion poses minimal risk of failure; which are inspected at least monthly; and, for which all sides are visible (i.e., the container has no contact with the ground), visual inspection alone might suffice in accordance with the deviation provision in §112.7(a)(2), subject to good engineering practice. In such case the owner or operator must explain in the Plan why visual integrity testing alone is sufficient, and provide equivalent environmental protection. However, containers which are in contact with the ground must be evaluated for integrity in accordance with industry standards and good engineering practice.

6. Question. It is common in cold states for Marketers to receive 100 or more 55-gallon drums of lubricating oil on a Monday, deliver to customers during the week, and end on Friday with less than 20 drums, which is less than the 1320-gallon threshold for an SPCC Plan. Will a SPCC Plan be required under the described circumstances?

Answer. Yes, a Plan is required under the circumstances described. The facility storage capacity is measured by the maximum amount of oil stored there at any time, in this case 5,500 gallons.

7. Question. Section 112.2. Dirt contractors often use small tank trucks with a capacity of greater than 1500 gallons for storage and distribution of diesel fuel. Does the usage of these trucks meet the definition of facility in this subsection?

Answer. Yes, such tank trucks are part of a facility because they are used to store oil.

8. Question. Section 112.7(a)(3)(vi). The requirement for clean-up contractor contact information applies for contractors under formal agreements; however, the rule preamble allows “less formal relationships” (agreements). Can an owner simply list contractors? Is there a timeframe within which the contractor must respond? Is a written agreement required? Does an agreement require a retainer?

Answer. Listing of a contractor with whom the owner or operator has an agreement for response is sufficient. The owner or operator should include information about a contractor that demonstrates the availability of the necessary personnel and equipment within appropriate response times. The owner or operator may want to include information about a specific contractor which demonstrates that the operator has researched the listed contractor’s availability of the necessary personnel and equipment within appropriate response times. An agreement to respond may include a contract or some less formal relationship with a cleanup contractor. No formal written agreement to respond is required by the SPCC rule, but if there is one, the owner or operator must discuss it in the Plan.

No response timeframe is specified in the rule. An appropriate response time is

one consistent with good engineering practice and the Area Plan in which the facility operates.

A written agreement to respond is acceptable, but is not required.

Whether an agreement to respond requires a retainer is a matter for the contracting parties.

9. Question. Section 112.5. The SPCC Plan must be amended if design, construction or maintenance change enough to affect potential discharge. Must the SPCC Plan be amended if the contents of a container regularly change between gasoline and diesel fuel or between a lubricant base oil and a finished lubricant?

Answer. A change of product is a material change requiring Plan amendment if the change substantially alters the conditions of storage and the potential for discharge. An example of a change of product that would be a material change would be a change from storage of asphalt to storage of gasoline, due both to flammability and density concerns. Storage of gasoline instead of asphalt presents an increased fire and explosion hazard. A switch from storage of gasoline to storage of asphalt might result in increased stress on the container leading to its failure due to the differences in product density. Changes of product involving different grades of gasoline might not be a material change and thus not require amendment of the Plan if the differing grades of gasoline do not substantially change the conditions of storage and potential for discharge. Changes of product involving a flammable product (e.g., gasoline) as opposed to combustible liquids (e.g., diesel) are material changes that substantially alter the conditions of storage and the potential for discharge. The owner or operator must determine whether there will be a material change, and generally does so on a facility specific basis.

10. Question. Section 112.7(a)(3)(i). The type of oil in each container and its storage capacity must be noted in the SPCC Plan. Must the SPCC Plan be amended when product is changed in a tank from diesel to gasoline or vice versa as a result of seasonal demands? Must the SPCC Plan be amended when a container is changed between #1 and #2 oil, between dyed and undyed distillates, or between a lubricant and an ancillary product?

Answer. A change of product is a material change requiring Plan amendment if the change substantially alters the conditions of storage and the potential for discharge. An example of a change of product that would be a material change would be a change from storage of asphalt to storage of gasoline. Storage of gasoline instead of asphalt presents an increased fire and explosion hazard. A switch from storage of gasoline to storage of asphalt might result in increased stress on the container leading to its failure. Changes of product involving different grades of gasoline might not be a material change and thus not require amendment of the Plan if the differing grades of gasoline do not substantially

change the conditions of storage and potential for discharge.

If the change of product is not a material change, it must be documented either in the Plan or in a log book or appendix which accompanies the SPCC plan.

11. Question. Section 112.7(h)(1). Secondary containment is required for the largest compartment of a truck. This is a problem in “frost-belt” states; especially for plants with limited space. In bulk plants with limited area and seasonal or weather-related restrictions, are there alternative compliance alternatives? What is the process of approval of alternatives?

Answer. See the answer to question #1. If no method of secondary containment is practicable because of engineering considerations, the owner or operator must provide a contingency plan following the requirements of 40 CFR part 109, and provide a written commitment of manpower, equipment, and materials required to expeditiously control and remove any quantity of oil discharged that may be harmful. The owner or operator must also conduct such other actions as are required by §112.7(d).

There is no alternative to containment other than those described above. The approval of the method of containment is a function of the engineer certifying the SPCC plan.

12. Question. Section 112.7(c). In the rule, containment areas must be capable of containing oil; in the preamble, they must be “sufficiently impervious to contain oil” and “it is assumed to construct secondary containment systems of impervious soil.” Some inspectors allow cement; some require liners; some allow clay. Please clarify to prevent disparate regional enforcement.

Answer. Dikes, berms, or retaining walls must be sufficiently impervious to contain oil. The purpose of secondary containment is to contain oil from escaping the facility and reaching the environment. An owner or operator of a facility should have flexibility in how he prevents a discharge as described in §112.1(b), and any method of containment which achieves that end is sufficient.

Similarly, because the purpose of the “sufficiently impervious” standard is to prevent discharges as described in §112.1(b), dikes, berms, or retaining walls must be capable of containing oil and preventing such discharges. Discharges as described in §112.1(b) may result from direct discharges from containers, or from discharges from containers to groundwater that travel through the groundwater to navigable waters. Effective containment means that the dike, berm, or retaining wall must be capable of containing oil and sufficiently impervious to prevent discharges from the containment system until it is cleaned up. The same holds true for containment floors or bottoms; they must be able to contain oil to prevent a discharge as described in §112.1(b). However, “effective containment” does not mean that liners are required for secondary containment areas.

Liners are an option for meeting the secondary containment requirements, but are not required by the rule.

If you are the owner or operator of a facility subject to this part, you must prepare a Plan in accordance with good engineering practice. A complete description of how secondary containment is designed, implemented, and maintained to meet the standard of sufficiently impervious is necessary. In order to document that secondary containment is sufficiently impervious and sufficiently strong to contain oil until it is cleaned up, the Plan must describe how the secondary containment is designed to meet that standard. A written description of the sufficiently impervious standard is not only necessary for design and implementation, but will aid owners or operators of facilities in determining which practices will be necessary to maintain the standard of sufficiently impervious. Control and/or removal of vegetation may be necessary to maintain the impervious integrity of the secondary containment. Repairs of excavations or other penetrations through secondary containment will need to be conducted in accordance with good engineering practices in order to maintain the standard of sufficiently impervious. The owner or operator should monitor such imperviousness for effectiveness, in order to be sure that the method chosen remains impervious to contain oil.

13. Question. If most SPCC Plans must be amended and thus require a PE seal, there will be a high demand for PEs. Since a certain amount of scrutiny and time is associated with each seal, the cost to obtain a PE certification would likely escalate significantly if all must be completed by February 2003.

Answer. All SPCC Plans will require amendment. Some Plans will require amendment only to include the new PE attestations required by §112.3(d).

We doubt that PE costs will escalate because of the rule. Many small facilities will drop out of the SPCC universe. Also, we extended the time for Plan amendment and implementation in the rule from a proposed 60 days because we agreed with commenters that more time was necessary. The owner or operator of an existing facility now has up to six months to amend his Plan, and to up six more months to implement any amendment. Therefore, we believe that the extended time period is sufficient to secure necessary certifications at a reasonable cost.

14. Question. Can EPA provide guidance materials (guidance factsheets, compliance checklists, brochures, workshops, internet-based guidelines, etc.) to help Marketers understand the requirements.

Answer. Yes, EPA will provide guidance materials. Some are already available on our website (www.epa.gov/oilspill); more are planned. We expect, in conjunction with Regional staff, to conduct extensive public education and outreach on the requirements of the revised rule, and how to comply with it.

15. Question. The rule is extremely long and difficult to read. Small businesses do not have the time nor resources to address them. Additionally, interpretations, both verbal and written, are conflicting. Given the number and type of clarifications needed, as well as the time involved in effecting changes once clarified, can the compliance deadline be extended to one year? If the deadline cannot be extended, can EPA issue guidance which states that inspections will not be conducted until after September of 2003 or later to prevent undue enforcement while resolving the issues, or in the event of third party lawsuits?

Answer. We wrote the rule in plain English to facilitate comprehension. The rule and preamble are long precisely because they answer many questions and provide many clarifications.

In response to public comments, we have already extended the compliance deadlines to one year for most facilities, as we noted above. We cannot commit to delaying inspections while compliance is ongoing. However, during any transitional grace period, owners and operators are still subject to enforcement for failure to have a required Plan, or for failure to prepare or implement a required Plan.

Again thank you for your memorandum. Please do not hesitate to contact me again if you have further questions. We are committed to working with small business to enhance rule compliance. Please contact Hugo Fleischman, Oil Program Center, Office of Emergency and Remedial Response, 703-603-8769, if you have any questions concerning this memorandum.

